Docket No. 14801

In the

United States Court of Appeals

For the Ninth Circuit

BILL CORBETT, *Appellant,*

v.

THE UNITED STATES OF AMERICA, *Appellee*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

This case involves an appeal from a conviction for evasion of federal income taxes in violation of former Section 145(b), Title 26 U.S.C.

JURISDICTION

The jurisdiction of the District Court was based on U.S.C. Title 18, Sec. 3231. Venue of the District Court was based on Rule 18, Federal Rules of Criminal Procedure. The defendant was indicted on four counts for evasion of federal income tax by a Federal Grand Jury on August 1, 1952 (R. 3-6). Count One involved the year 1945, Count Two involved the year 1946, Count Three, the year 1947, and Count Four the year 1948. The defendant was arraigned on August 8, 1952, and pleaded not guilty to all four counts (R. 10 and 11). The defendant was tried and found guilty on Counts 1 and 2 (R. 13, 17) and judgment and sen-

tence were entered by the United States District Court for the Western District of Washington, Southern Division, on December 28, 1954 (R. 17-18).

Jurisdiction of this court is based upon U.S.C. Title 28, Sec. 1291. Notice of Appeal was filed in the District Court for the Western District of Washington, Southern Division, on December 29, 1954 (R. 20-21). Federal Rules of Criminal Procedure, Rule 37. Venue of this court is established by U.S.C. Title 28, Sec. 1294(1) and the fact that the defendant was convicted for an offense occurring in the Western District of Washington within this circuit.

STATUTES INVOLVED

The statute involved in this case is Sec. 145(b), Title 26, U.S.C. (1939) which states as follows:

> "(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

QUESTIONS PRESENTED

1. Was there evidence, sufficient to take the case to the jury, that income was received by defendant and

not entered in the books in amounts exceeding the income restored by defendant to the books and tax returns in 1945 and 1946?

2. Did the testimony of a government agent purporting to trace items into deposit tickets in evidence constitute error where the deposit tickets were not in evidence nor in existence?

3. Does it invade the province of the jury for a revenue agent, purporting to make an accounting summary on the basis of the evidence introduced, to testify both orally and by exhibit, not on hypothesis but as proven fact, that defendant received certain income, when the records in evidence on their face show the contrary and his conclusion of receipt of income is inference or speculation from contradictory testimony which does not directly establish receipt of the income?

4. Was it proper, in a case where net worth is not involved, to introduce financial statements of defendant having no bearing on the issues and then put in a great mass of far removed, immaterial, prejudicial evidence in an attempt to prove the statements false?

STATEMENT OF FACTS

Defendant was indicted for income tax evasion on four counts for the calendar years 1945, 1946, 1947 and 1948, respectively (R. 3-5). Count Four for the year 1948 was dismissed by the Court (R. 827). Corbett was acquitted by the jury on Count Three for the year 1947 (R. 13, 1135). This appeal involves Counts One and Two, the years 1945 and 1946, for which defendant was

convicted and sentenced to two and one-half years on each count, the sentences to run consecutively, and a fine of $5,000 on each count, together with costs (R. 13, 17, 18, 1135, 1154). The indictment for 1945 alleged that defendant's net income was reported as $10,021.48, whereas it actually should have been $23,359.07 (R. 3). The indictment for 1946 alleged that defendant's net income was reported as $8,274.44, whereas it actually should have been $26,759.01 (R. 4).

Prior to trial defendant demanded a bill of particulars specifying the items aggregating the claimed net income for each year (R. 6). This demand was denied (R. 9).

At the trial the government made no attempt to show any increase in defendant's net worth, but attempted to prove that specific items of income had been received by defendant and not reported. For the years 1945 and 1946, these items of alleged income grew out of the operation by defendant of the Claremont Hotel, Seattle, as an individual proprietor and were:

(1) That the income of the Claremont Hotel had, before being reported on defendant's tax returns in the years 1945 and 1946, been reduced by allowances crediting the guests' accounts on the books of the hotel when in fact the guests had actually paid the accounts (R. 796, 800).

(2) That some overnight rentals of rooms and cots by the night clerk in the years 1945 and 1946 had not been reported (R. 796, 799).

(3) That salary checks of $350.00 received by an

employee named Newton had been delivered over to defendant in the year 1945 and that the employee had not received the benefit thereof (R. 796).

Defendant operated the Claremont Hotel as an individual in the last six months of 1945 and in 1946 (R. 261, 863). The hotel was operated in the first six months of 1945 by a corporation wholly owned by defendant (R. 261, 863).

Defendant maintained books and records for the hotel (R. 929-930). The Internal Revenue agents who audited these books testified that the bookkeeping system used was entirely adequate and would show the correct amount of tax if the entries made therein were correct (R. 761, 785-786, 812). Defendant's returns agreed with the books (R. 761).

Charges to guests at the Claremont hotel usually were entered on guest ledger sheets every night (R. 275-278, 596-600, 893-898). These charges were carried forward day by day in accumulated totals as accounts receivable, were transferred to a daily transcript and eventually went into the income reported on the income tax returns unless reduced by some offsetting entry. (R. 275-278, 596-602, 895-898, and Def.'s Ex. A-1 for illustration). The hotel had some transient guests, but many of the guests stayed there by the month (R. 865). During this period the defendant was attempting to transfer more rooms to a transient basis because of the higher return (R. 865, 867-871, 900).

When a guest made a payment on his account, he was credited with the payment on the guest ledger sheet

(R. 145-148, 342-343), and the payment was entered on a daily cash sheet (R. 145-148, 342-343). There were instances where the guests did not pay the charges entered against him on the ledger sheet, including instances of bad debts, adjustments on his account, and free lodging (R. 330, 626, 859, 909-913).

Where guests were given credit on the guest ledger sheet for amounts that they did not pay, pink allowance slips (entitled "guest credit slip") were prepared showing the amount of the credit and these slips had to be okayed by defendant (R. 618-619, 626). They were then entered on the guest ledger sheet as a credit to the guest and as an allowance (R. 289-290).

A guest remaining six days at times received the seventh day free (R. 228), and sometimes permanent guests received a 31st day free (R. 454-455). Employees, as well as certain notable or entertainment personalities, were given free lodging (R. 355-356, 389, 787, 884-885, 906, 909). Newton, who had been a clerk at the hotel, testified a number of times that there were actual bona fide allowances (R. 411, 434, 472). Harold Vowles, who had been night clerk and night auditor, testified that there were valid allowances (R. 626). Bernice Morgan, who had been a clerk, testified that allowance slips where there was an erasure represented money that was supposed to be paid back to guests on an adjustment (R. 162). Beatrice Murta, who had been the bookkeeper, testified that the allowances could be bad debts (R. 330). All of these witnesses were government witnesses.

Myrtle Cole and Anna Chapman, two permanent

residents of the Claremont hotel for many years, testified their monthly bills during this period would show a charge far in excess of the amount actually paid, which was the O.P.A. ceiling, and that an allowance would be given which would reduce the bill to the amount actually paid (R. 873-874, 877-879). They often paid their bills on this basis to Loretta Newton (R. 875, 879).

Various witnesses including defendant testified that defendant had prepared or caused to be prepared allowance slips in some cases where the guest had actually paid his entire bill, including the amount of the allowance (R. 350-354, 601-602, 618-619, 912-917). On the basis of these slips, the clerks made the same entries on the guest ledger sheets that they made in the case of any other allowance, that is by crediting the guest and showing the amount as an allowance (R. 349-354, 361-364, 548 et seq.). The effect of these improper allowance slips was to reduce by the amount thereof the income which would otherwise have been reported on defendant's returns (R. 284-285, 300, 605, 775).

Government agents McCarthy and Marx had segregated some of the guest ledger sheets and allowance slips of the hotel into groups (R. 749-750, 766) and these groups were introduced in evidence as plaintiff's exhibits 13, 14, 15, 16, 17, 46, 47, 49, 51, 64, 72-A, B and C and 73-A B and C.

Nineteen former guests of the hotel testified that they had paid their bills and received no actual allowances (R. 485-540). In each of these cases defendant had

caused to be made an allowance slip showing part or all of the amount of their bill as having been allowed to them rather than paid. The total of the allowances so testified to was $26.50 in 1945 and $962.50 in 1946. (See Appendix A)

Bernice Morgan a clerk, identified on guest ledger sheets introduced as plaintiff's exhibit 13 certain guest accounts which she recognized as having been paid because of entries to that effect by her which had been erased and allowances entered (R. 157-169). The allowances totaled $752.26 for 1946. (See Appendix B)

Loretta Newton, a clerk, was shown a group of guest ledger sheets which had been segregated by the government agents and marked plaintiff's exhibit 15 (R. 399). She identified certain specific ledger sheets as having been paid, although allowance slips had been written for these accounts, and testified that generally she had never given an allowance where the money had not already been paid (R. 355-363, 464, 477). The specific items testified to totaled $520.58 for the year 1946. (See Appendix C). Two additional guest ledges tickets totaled $125.93 for the year 1946 (R. 464-465, Pltf.'s Ex. 51). (See Appendix C). Newton also introduced a note book which she had kept (Pltf.'s Ex. 45), listing certain allowances which she entered on the records in 1946 although they had been actually paid by the guests, and introduced hotel guest ledger cards concerning these same accounts (R. 367-369). These totaled $258.58. (See Appendix C). The total of the above items (Pltf.'s Ex. 46, R. 371) for the year 1946 was $904.39. She testified that the book (Pltf.'s Ex. 45) included also pro-

per allowances which had been actually given to the guest (R. 411).

Irene Krueger, a telephone operator, identified a number of allowance slips that were partially in her handwriting (R. 210-224). She testified, however, that she did not know whether the guests received the benefit of these allowances (R. 213). As to one slip in the amount of $110.75, marked "cash shortage", she testified that she had never been short in her cash (R. 213).

Harold H. Vowles, the night clerk, testified to two rooms where $15.44 and $47.14 had been paid but removed from the ledger sheet (R. 617-618).

An expert witness, Arthur W. Bauman, fumed and photographed some of the cash sheets used by the defendant's hotel (Pltf.'s Exs. 52-62) showing that some entries on these sheets had been removed (R. 546-547). Entries so removed from these cash sheets were in the same names and amounts and bore the same dates as allowance slips in evidence totaling $566.64 in 1945 and $388.91 in 1946 (R. 541-573). (See Appendix D)

The government called as a witness William F. Marx, who had been the Internal Revenue agent investigating the case, but who at the time of testifying was in private practice as a certified public accountant (R. 759-760). Marx testified that he had compared allowances in evidence with deposit tickets in evidence of the various personal bank accounts and the hotel accounts for the day after the allowance slip was dated, and attempted to find deposits of checks which agreed in exact amounts with the allowances (R. 766). Marx examined plain-

tiff's exhibits 73-A, 73-B and 73-C and testified that he had so traced certain amounts therefrom into the Bank of California and the National Bank of Commerce accounts of defendant for 1945 and 1946 (R. 771). However, there were no deposit tickets of the Bank of California in evidence or in existence for 1945 since they had been routinely destroyed by the bank (R. 132-133). Marx then totaled the allowances in plaintiff's exhibits 72-A, 72-B and 72-C (R. 772). Marx testified that in 1945 there were currency deposits in the various personal bank accounts totaling $7,706, and in 1946 there were currency deposits in the various personal bank accounts totaling $61,502.99 (R. 773-775).

Defendant testified that he had borrowed large sums from Mr. Birkland starting in June and July, 1945, in the amounts of $75,000, $49,000, $50,000 (R. 925). Defendant also testified that during the period 1945 to 1948 he was borrowing heavily at various places (R. 925).

Some rooms and cots in the hotel were rented by the night clerk, Vowles, on a one-night basis where no guest ledger sheets were prepared, and part of these receipts were not entered on the cash sheet (R. 605-610). These night receipts not entered on the cash sheets did not, in the regular way, get into the income accounts of the hotel (R. 316-317, 607-608, 777). Vowles testified that he had kept a record from the time he commenced work in February, 1945, until July 1, 1947, of the night rentals not put through the books in the regular manner, and it was about $7,200 (R. 611-612, 633). Also, at another point in his testimony, he estimated that the

night rentals could have run $20 to $30 per night (R. 611). Vowles testified that he commenced work for the hotel on February 7, 1945, and worked until December, 1947 (R. 596), and that the night rentals not entered on the books in the ordinary way did not continue through this entire period (R. 610). In both 1945 and 1946 when defendant was away on trips the night rentals were entered on the books in the ordinary way (R. 610). Former revenue agent Marx testified that it was possible that some of the rooms rented by Mr. Vowles, the night clerk, where no guest ledger sheets were created, went into the books (R. 788).

Loretta Newton testified that as a vice-president she received from the corporation operating the Claremont hotel during the first six months of 1945 salary checks totaling $350 or $360 (R. 383). She testified she returned these to the defendant (R. 383-384). The revenue agents stated that the salary was $368.80 on which $73.76 was withheld so that the checks totaled $295.04 (R. 776). Defendant denied that these checks were returned to him (R. 942). The withholding on this amount went to Loretta Newton (R. 384).

Newton could not testify whether she received any of the $350 salary as vice-president because she said she received some money of her own and didn't know whether it was all mixed up (R. 384). She received an income tax refund (R. 384).

During 1945 and 1946 the Claremont hotel was under O.P.A. rental regulations (Def.'s Ex. A-6, R. 627, 865-867, 923). Defendant had applied for increased rental

rates for his rooms, and this application was subsequently granted (Def.'s Ex. A-7, R. 867 and 886).

Defendant testified that he had restored to income on the books of the hotel the full amount removed or withheld from the books, whether by means of improper allowances or by the night clerk rentals, by causing the bookkeeper from time to time to record as income flat sums called "overages", "transient rentals", and other general designations (R. 899-905, 943-945).

The cash sheets (Pltf.'s Exs. 11, 12) and the transient rent journal (Pltf.'s Ex. 9), wherein entries were made from the cash sheets, contain items of cash income under the heading of transient rents, overages, cash shortages and the like, for which there are no guest ledger cards. The totals of these entries are as follows (Pltf.'s Ex. 9, Def.'s Ex. A-8; R. 903-905):

July, 1945-December, 1945	$4,537.35
Jan., 1946-December, 1946	$7,900.77

Mrs. Murta, the bookkeeper, testified that defendant from time to time gave her cash in lump sums which she put in the bank and added to income on the cash sheets (R. 269-270, 285, 313-314, 320). This was confirmed by the clerks (R. 269-270, 285, 313-314, 320, 404, Pltf.'s Ex. 11). Revenue agent Marx testified that he had found on the cash sheets lump sum additions to income totaling $1,465.73 in 1945 and $5,106.25 in 1946 (R. 763). The cash sheets show, however, lump sum additions to income in 1945 of $1,665.73 rather than $1,465.73 in the transient rent column as follows:

1945	*Entered by*	*Exact Words*	*Amount*
Aug. 18	B. Murta	"Cash over"	$ 615.73
Sept. 12	B. Murta	"Cash" "Papers"	200.00
Oct. 7	B. Murta	"Various Guests" "Trans. Rent" "Cash"	250.00
Dec. 5	B. Murta	"Cash Shortage" "Cash"	400.00
Dec. 5	B. Murta	"Trans. Rent"	200.00
		Total	$1,665.73

In addition, there are lump sum additions to the "permanent rent" column of the cash received journal (Pltf.'s Ex. 9) in the following amounts:

July 3, 1945	$105.00
August 3, 1945	105.00
November 15, 1945	200.00
Total	$410.00

The lump sum additions to income in 1945 were, therefore, $1,665.73 plus $410.00 or a total of $2,075.73.

Government witness Costello, who had been the accountant making up Corbett's 1945 tax return, testified that $1,400 had been added to income as an additional cash item which he had placed under "wagering and other income" because he advised defendant it was better to place it in that category than as "cash over" (R. 683-684). An additional $2,000 was put on the 1946 return in the same manner and under the same heading (Pltf.'s Ex. 3, R. 1039).

Government witness McCarthy identified financial statements which had been given by the defendant to the government agents, representing the defendant's finanial position in 1938 and December 31, 1948, and these were admitted over objection (R. 739-740, Pltf.'s Ex. 71).

The government then introduced into evidence over objection financial statements which defendant had given to his banks (R. 741). These were statements to Bank of California, May 16, 1946 and May 15, 1947 (Pltf.'s Ex. 27); to the National Bank of Commerce, February 1, 1947 and November, 1947 (Pltf.'s Ex. 31); and statements submitted to the Peoples National Bank of May 15, 1947 and December 1, 1948 (Pltf.'s Ex. 38) (R. 741-747).

Testimony as to defendant's financial affairs between 1919 and 1938 and after 1948 was developed on cross-examination of defendant. This testimony is outlined in the argument.

SPECIFICATIONS OF ERROR

Appellant relies upon the following errors of the Court below:

1. The Court erred in denying defeandant's motion for judgment of acquittal at the close of the case, since there was not sufficient evidence of unreported income to sustain a conviction on either count as a matter of law (Statement of Points, Nos. 2, 3, 16).

2. The Court erred in allowing government agents Marx and Holtberg to testify that on the exhibits in

evidence certain amounts could be traced to defendant's bank account when there were no such exhibits in the record (R. 759-827) (Statement of Points, No. 19).

3. The Court erred in allowing government agent Holtberg under the guise of giving an accounting summary to usurp the province of the jury by testifying that the evidence established receipt by defendant of certain income, whereas this was not established by any books or records but was contrary to them and was only Holtberg's inference from conflicting testimony. Plaintiff's exhibit 74 was offered containing these conclusions of Holtberg (R. 793). Defendant objected on the ground that it was incompetent, irrelevant and immaterial (R. 793) and that since the exhibit was said to be based on all of the evidence in the case, it left it too broad to determine upon what basis he made his computations (R. 795). The Court, without ruling on the objection, directed that a copy of plaintiff's exhibit 74 be passed to each juror and permitted Holtberg to testify orally as to each item therein (R. 795 et seq.). Later the Court admitted plaintiff's exhibit 74 (R. 825) (Statement of Points, Nos. 11, 19, 20, 21, 22).

4. The Court erred in admitting plaintiff's exhibit 71, a written statement given by defendant to agent McCarthy as to defendant's financial position in 1938 and December 31, 1948 (R. 739-740). Plaintiff's exhibit 71 showed net worth in 1938 of approximately $110,950 and on December 31, 1948 of $28,021.56. Defendant's objection was the "basic objection plus definitely now the objection that the Commissioner has not certified

any income tax deficiency authorizing this procedure" (R. 740). The "basic objection" was that an admission of defendant is improper, immaterial and incompetent until the corpus delicti was proved (R. 66). Statement of Points, Nos. 7, 17, 24, 26).

5. The Court erred in admitting plaintiff's exhibits 27, 31 and 38, consisting of financial statements given by defendant to banks as follows:

Exhibit 27—Statements to Bank of California as of May 15, 1947, February 1, 1947, and May 16, 1946 (R. 136).

Exhibit 31—Statements to National Bank of Commerce, Central Branch, as of February 1, 1947 and November, 1947 (R. 140).

Exhibit 38—Statements to Peoples National Bank as of May 15, 1947 and December 1, 1948 (R. 127).

Defendant objected to these exhibits on the ground that they were incompentent and immaterial (R. 127, 136, 141). The Court reserved ruling. They were reoffered after introduction of plaintiff's exhibit 71 (R. 740). Defendant renewed his objection (R. 741) but they were admitted (R. 741). (Statement of Points, Nos. 18, 26).

6. The Court erred in permitting the government to put into evidence (R. 970-973), through questions to defendant, the existence of and the contents of a petition for bankruptcy filed by defendant in 1925 (Pltf.'s Ex. 79 for identification), over the objection of defendant that it was immaterial (R. 970) and without admit-

ting the exhibit, the Court stating to government counsel (R. 971):

> "The Court: Before I admit the exhibits as a whole you can direct the witness' attention to those portions you have in mind, * * *"
> (Statement of Points, No. 12)

7. The Court erred in permitting the government to put into evidence (R. 985-987), through questions to defendant, the fact of and the details concerning a suit against defendant for a $249 fuel bill in 1938 (R. 979-980; Pltf.'s Ex. 80 for identification), over the objection of defendant (R. 984) and without admitting the exhibit. (Statement of Points, No. 24)

8. The Court erred in permitting the government to read into evidence (R. 981-984), without having it marked or introduced, an affidavit of defendant in 1928 in which he stated that he was entirely without funds and asked welfare for his wife. Defendant objected to the reading from this affidavit on the ground that it was incompetent, irrelevant and immaterial and completely prejudicial having no reference to any issue in the case (R. 982-983). The Court stated (R. 983):

> "The Court: The portion relating to the statements made in the affidavit concerning his financial status at that time is admissable and may be referred to."
> (Statement of Points, No. 13).

9. The Court erred in permitting the government, over defendant's objection that it was immaterial and the trial should be confined to the years involved (R. 992-993), to examine defendant concerning the amount

of income taxes he had paid since 1948 and the tax status of his sale of the Claremont hotel in 1951 (R. 991-994). Statement of Points, No. 14)

10. The Court committed plain error in permitting the government to examine defendant as to a large number of his financial affairs between 1919 and 1938 in an effort to show falsity in defendant's financial statement of 1938 (Pltf.'s Ex. 71) which was irrelevant and immaterial (R. 966-987). (Statement of Points, Nos. 23, 24).

ARGUMENT

While failing to establish that any income of defendant in 1945 and 1946 was unreported, the government improperly made the contrary appear to the jury by putting a revenue agent on the stand as an "expert" who usurped the function of the jury by asserting as proven fact that which was only his own personal interference. Also the government improperly prejudiced the jury by introducing irrelevant statements and attempting to prove them false.

This case involved the operation of the Claremont Hotel in Seattle. The issue, for the years 1945 and 1946 in which there were convictions, was whether defendant received income from night rentals, and income from guests in amounts which the guest ledger sheets showed as having been granted to the guests as allowances, which he failed to report on his returns. The evidence established and defendant admitted that some night rentals had not gone through the books in the ordinary way and that accounts re-

ceivable from guests on guest ledger sheets had been reduced by allowances in some cases where the guest had actually paid his entire bill. Defendant claimed that he had restored to income in each year the full amount of these items by lump sum additions to the books and tax returns.

A.
Insufficient Evidence on Receipt of Unreported Income To Take Case to Jury.

On the evidence introduced there was a reasonable doubt, as a matter of law, as to whether defendant had received any substantial unreported income, and the case should not have been submitted to the jury. In our discussion of this point it is important to bear in mind that the Claremont Hotel was operated by a corporation during the first six months of 1945 so that the night rentals and allowances involved are those for only the last six months of 1945 and for the entire year 1946.

1. Night Rentals

The only evidence as to the amount of night rentals not recorded in the books in the ordinary way was in the testimony of government witness Vowles. When asked to give an estimate of these rentals he said they might average $20 to $30 a night (R. 611). He stated, however, that this would not be for the entire period because whenever defendant was out of town Vowles put the night rentals through the books in the ordinary way (R. 611). He then testified that

he had kept a written record of these night rentals which were not recorded in the ordinary way, but had destroyed it when O.P.A. controls went off (R. 611-612). The total of this written record was about $7,200 covering the period from February 7, 1945 to July 1, 1947 (R. 596, 612, 633).

The testimony as to the written record casts at least a reasonable doubt on any calculation based on $20 per night, which, as we will show, was used by the government agents. If we multiply $20 by 873 days, the period covered by Vowles' written record from February 7, 1945, to July 1, 1947, we would reach a figure of $17,460, far more than double that of the $7,200 total of the written record. Vowles' recollection of his actual written record is more to be trusted than his estimate, pulled out of the air, of $20 to $30 per night, particularly in view of his testimony that there were periods when defendant was on trips when these rentals were put on the books in the ordinary way, and the lack of testimony as to the time and duration of these periods. Vowles said that defendant was away for periods both in 1945 and 1946 (R. 610). Government witness Newton testified to one such trip in the latter part of 1945 but there was no showing as to the time defendant was away, although it appeared that the trip began sometime prior to November 15, 1945 and extended into 1946 (R. 386-389).

Even from the $7,200 total of the former written record it is impossible to arrive at the amount for either the year 1945 or the year 1946 with the cer-

tainty required to sustain a conviction. For all that appears in the record the bulk of the $7,200 could have been in 1947, a year for which defendant was acquitted. In a tax evasion case where each year is a separate count, the burden is on the government to establish what portion of this amount accrued during each separate year. *U. S. v. Altruda,* 224 F.(2d) 935, 938 (C.A. 2). We submit, therefore, that in determining whether there was sufficient evidence to take this case to the jury, no income from night rentals is properly to be considered.

2. Allowances

Defendant approved a large number of pink allowance slips (actually entitled "guest credit slips") during both 1945 and 1946 on the basis of which the clerks reduced the charges against the guests appearing on the guest ledger sheets.

No doubt was left by the evidence that some of these allowances were legitimate in the sense that the guests had received the benfit of them and the charges against the guests on the guest ledger sheets and the income of the hotel were properly reduced thereby. See Statment of Facts, supra. All of the government witnesses who had worked at the hotel testified that there were legitimate allowances. Nor was doubt left by the evidence that some of these allowances were illegitimate, in the sense that the guest had not received the benefit thereof but had paid his full account and the charges against the guest on the guest ledger sheets and the income of

the hotel were improperly reduced thereby. See Statement of Facts, supra.

In attempting to prove the amount of illegitimate allowances, the government introduced exhibits 13, 14, 15, 16, 17, 46, 49, 51, 55, 60, 64, 72 and 73, a number of allowance slips, some accompanied by guest ledger sheets and some not. As to only a portion of these allowances however, was evidence offered to show whether the guest did or did not receive the benefit of the allowance. Nineteen former guests testified they had received no benefit of allowance slips totaling $26.50 in 1945 and $962.50 in 1946. Bernice Morgan identified certain of the guest ledger sheets which she recognized as having been paid where there were allowance slips totaling $752.26 in 1946. Loretta Newton testified to various specific guest ledger sheets as having been paid where allowance slips totaled $100 in 1945 and $904.39 in 1946. Irene Krueger testified that one slip for $110.75 in 1945 marked "cash shortage" involved an entry in her writing and that she had never been short in her cash (R. 213). She mentioned some other allowances but stated that she did not know whether the guests had actually received the benefit thereof (R. 213). Vowles testified to two allowance slips of $15.44 in 1945 and $47.14 in 1946 where the guest had actually paid (R. 616-618).

During the testimony of Loretta Newton she was handed (R. 357) a group of ledger sheets, plaintiff's exhibit 15, which had been identified by agent McCarthy simply as a group of guest ledger sheets and

guest credit tickets (R. 106). Newton had previously testified that she had examined the cash sheets and guest ledger sheets for the Claremont Hotel and had "picked out the cash sheets with the ink eradications on them and where the allowances had been made in my handwriting on the guest ledger sheets" (R. 356). However, it developed on cross-examination that she had not picked them out but they had been segregated by the agents and then shown to her (R. 399).

The following testimony was given by Newton (R. 357):

> "Q. I will hand you Exhibit 15 which has been identified as ledger sheets of the Claremont Hotel during the years 1945, '46 and '47 and ask if you can identify those yourself?
>
> "A. Should I go through all of these?
>
> "Q. No, can you tell if those are the same ones?
>
> "A. Yes, those are the same ones.
>
> "Q. And do you know whether or not you showed Mr. Holtberg and were thereafter segregated and put in the condition they are now?
>
> "A. Yes."

Inasmuch as Newton had previously testified that she had never given an allowance for room rentals or total charges to a guest ledger sheet where the money had not already been paid (R. 355), the government may contend that all of the allowances in the ledger sheets in plaintiff's Exhibit 15 had by this testimony been proved to have been received by defendant.

This testimony does not meet the exactness required

for conviction in a criminal case. The testimony shows that Newton did not examine the ledger sheets in plaintiff's Exhibit 15 when handed to her on the stand and she did not state definitely that each allowance thereon had been entered by her. She merely looked at the pile of sheets. She was merely assuming that the group handed to her was the same as some she had previously seen. There was no exact testimony by anyone as to who wrote on each of these sheets and what the particular entries represented. It appears from the cross-examination that the basic decision as to the handwriting involved was not made by her but by someone who did not testify.

As a matter of fact, in examining the ledger sheets comprising plaintiff's Exhibit 15 one finds that there are sheets where there are no entries under either cash or allowances, other sheets where no allowance entries appear but only entries of cash received, which the evidence showed was picked up as income on the books. While some sheets show erasures in the cash column and entries in the allowance column, others show erasures in the allowance column and entries in the cash column and others show no erasures at all. Moreover, the entries of allowances on these sheets appear to be in more than one handwriting. This confusion is highlighted by Newton's own testimony as to the very first sheet, where she stated that the allowance was not in her handwriting (R. 357) despite her basic testimony that she had picked out sheets where the allowances had been made in her writing.

We submit that this haphazard method of proof does not establish beyond reasonable doubt, for a specific item tax prosecution, that defendant received as income any specific amounts.

The government also put on witness Bauman who had fumed certain cash sheets to ascertain entries that had been removed by ink eradicator. Photographs of these cash sheets were introduced as plaintiff's exhibits 52 to 62 (R. 546-547). Bauman indicated that cash entries tying in with allowances had been made and erased in connection with guest charges totaling $566.64 in 1945 and $388.91 in 1946. Statement of Facts, supra. While this is not direct evidence of receipt by defendant of the money and still requires an inference by the jury, we have included these cash sheet entries among those as to which evidence of receipt was introduced in order to lean backward in the matter.

In the above evidence as to receipt by defendant of allowances, however, there were duplications of $15.44 in 1945 and $298.22 in 1946. See Appendix E.

In summary we find that there was some evidence tending to establish that defendant had received allowances in the following amounts:

Witness	1945	1946
Various guests	$ 26.50	$ 962.50
Bernice Morgan		752.26
Loretta Newton	100.00	904.39
Irene Krueger	110.75	
Harold Vowles	15.44	47.14

Arthur Bauman	566.44	388.91
	$819.13	$3,055.20
Less duplications	15.44	298.22
Total	$803.69	$2,756.98

There was no other testimony showing any additional allowance slips to have inured to the benefit of defendant except the testimony of revenue agent Marx now to be discussed.

3. *Revenue Agent Marx improperly testified to conclusions from evidence not introduced.*

At the outset of the trial defendant's counsel asked for exclusion of witnesses (R. 53). All witnesses were excluded except that three witnesses, agents McCarthy and Holtberg and former agent Marx were permitted to remain at the government counsel table throughout the trial on the representation that the testimony of Marx to a degree and of Holtberg entirely would be based on their continued presence in the courtroom (R. 83-86).

When Marx took the stand he was qualified as an expert certified public accountant (R. 759-760). After some preliminary matters he was asked if he had made a comparison of allowances with certain bank deposit slips in evidence. He replied that he had made analysis of the deposit slips of the various bank accounts in evidence to determine unidentified currency deposits. Government counsel then outlined the exhibit numbers of the deposit tickets in evidence and Marx stated that his analysis included defendant's personal

accounts but not the Claremont Hotel account itself (R. 764-765).

Marx was then asked if he had examined the accounts for other than currency. He testified that he had made a comparison of the deposit tickets and the allowance tickets to find individual check deposits corresponding to allowance slips (R. 766). He then read the date (July 2, 1945) and amount ($15.00) of an allowance slip in plaintiff's Exhibit 73-A and stated that there was a check deposited to the Bank of California July 3 (R. 767). He asked if he should read all of the information on each ticket. The Court then stated (R. 768):

> "Those exhibits are in evidence, Mr. Marx, so that anything that appears from them may be properly read."

To the inquiry of defense counsel as to information concerning checks deposited to the Claremount account, the Court then said (R. 768):

> "I am merely telling Mr. Marx anything that appears on those papers is already before the jury . . ."

Marx then read off allowance slips for 1945 totaling $1,989.88 and as to each slip testified that there was a deposit in like amount in the following day in the Claremont Hotel account in the Bank of California. He testified to the total only of individual check deposits in the same bank in 1946 of $269.91, where, he said, he had likewise traced the amount of specific allowance slips. He testified to the total only of individual check deposits in the National Bank of Com-

merce account of $497.14 in 1945 and $29.95 in 1946, where likewise he said he had traced allowance slips (R. 769-772).

As Marx then shifted from check deposits to currency deposits the Court stated (R. 774):

> "Mr. Marx is merely making computations of exhibits that are already in evidence bringing out certain features about them that is proposed which is an entirely proper thing to do."

The fact is that there were and are no deposit tickets at all in evidence for the Bank of California for 1945. The bank official, Hobart, testified that his bank had routinely destroyed all deposit tickets for that year (R. 132-133).

It is evident that while giving the Court and jury the impression that he was merely summarizing exhibits in evidence, Marx was, in fact, as to the $1,989.88 identified by him as having gone into the Bank of California in 1945, testifying on the basis of information not in the record. While it might be that he had examined the deposit tickets prior to their destruction, there was no mention of this fact, no request to introduce secondary evidence and no opportunity to cross-examine on who gathered the information he was reading, the source of it, how thoroughly and accurately the information was prepared and like questions. As the record here stands there is no way the accuracy of the testimony given can be tested.

The importance of being able to test the accuracy

of the testimony is shown when the deposit tickets for 1945 in the National Bank of Commerce account, which are in evidence as plaintiff's Exhibit 29, are examined. Marx testified that he had matched $497.14 in allowances on plaintiff's Exhibit 73 with check deposits listed on these 1945 National Bank of Commerce deposit tickets (R. 771). Yet examination of these deposit tickets with the allowances in plaintiff's exhibit 73 fails to disclose a single check deposit in the same amount as an allowance.

This testimony had an importance in the trial going far beyond the dollar amounts actually involved. It had a tendency to lead, and it is obvious that the government introduced it for the purpose of leading the jury to believe that as a general practice the allowances showed up in Corbett's bank accounts. Moreover it was the testimony as to the 1945 Bank of California deposits that stood out in this respect because each separate allowance and deposit was mentioned and the total was substantial while the accounts from other banks and other years were not substantial in amount and were not presented in detail. This testimony was followed immediately by testimony as to the total of currency deposits each year in the various bank accounts, the attempted inference obviously being that those allowances not traced into check deposits found their way into currency deposits.

The impropriety of testimony of a government agent based on material not in the record and the accuracy of which there is no opportunity to test by cross-examination is expounded in the case of *United States*

v. Ward, 169 F.(2d) 460 (C. A. 3). There a former agent of the Federal Bureau of Investigation summarized invoices which he said were unsupported by the testimony. It appeared that in reaching his conclusion as to which invoices were unsupported he relied on material outside the record, specifically information as to when ships were in port and information in sworn statements taken by the F.B.I. from a number of employees. The Circuit Court reversed convictions for conspiracy to defraud the United States saying (p. 462):

> ". . . Nor may expertness be the medium for injecting into the record material and information not a part of the expert's qualifications and otherwise inadmissible through his lips.
>
> . . .
>
> "The effect of Johnson's testimony was not simply to exclude 'some government testimony.' Rather it affirmatively declared the unreliability of records and witnesses on a basis neither accessible to the jury, nor assessable by it."

Similarly at bar, Marx declared that substantial allowances appeared as deposits in defendant's bank account in 1945 on a basis neither accessible to the jury nor assessable by it. The result, as the Third Circuit pointed out in the *Ward* case at 169 F.(2d) p. 463, is to give the jury an illegitimate premise for resolving the issue before it.

We submit that this testimony of Marx constituted reversible error, in and of itself, going to the entire case. We further submit that in any tabulation as to whether the government introduced evidence of in-

come not put through the books exceeding defendant's restorations to income, Marx's purported tracing of 1945 deposits should not be included. This applies not only to the 1945 Bank of California account but also to the 1945 National Bank of Commerce account where no tracing is possible to the deposit slips in evidence.

4. Lump sum restorations to income.

Government witness Murta, the bookkeeper, testified that Corbett from time to time gave her cash in lump sums that he called "overages" which she put in the bank and added to income (R. 269-270, 285, 313-314, 320). One of these lump sums was deposited March 20, 1946, and added to income on the cash sheet for March 19, 1946, in the sum of $600 (R. 315-316), Pltf's. Ex. 11). Another in the sum of $350 was pointed out by government witness Newton as added to income on April 28, 1946 (R. 404, Pltf's. Ex. 11).

Agent Marx testified that he had examined the cash sheets in evidence as plaintiff's exhibits 10, 11 and 12 and had found lump sum additions to income thereon totaling $1,465.73 in 1945 and $5,106.25 in 1946 (R. 763).

Examination of the cash sheets (Pltf.'s Exs. 11 and 12) discloses, as outlined in detail in the Statement of Facts herein, that the lump sum restorations to income in 1945 actually were $2,075.73.

In addition, government witness Costello, the certified public accountant who had drawn up defendant's 1945 tax return, testified that defendant had him add

$1,400 to income on that return as "cash over," which Costello put under the heading of "wagering and other income" (R. 683-684, Pltf.'s Ex. 67). A similar amount of $2,000 was added to income on the return for 1946 (Pltf.'s Ex. 3, R. 1039). The books of account in evidence show that the lump sum additions in the cash sheets of $2,075.73 in 1945 and $5,106.25 in 1946 found their way into the gross rental income from the hotel on the 1945 and 1946 returns and are separate from and in addition to the $1,400 and $2,000 added directly on the 1945 and 1946 returns. The total restorations to income by defendant in 1945, therefore, were $3,475.73, and in 1946, $7,106.25.

5. Newton's salary checks

During the first six months of 1945 when the Claremont Hotel was operated by a corporation, Loretta Newton was vice-president of the corporation (R. 382). She received salary checks as vice-president which she estimated totaled $350 or $360 which she testified she returned to defendant (R. 383-384). Marx testified the salary totaled $368.80 for the year 1945 from which $73.76 was withheld so that the checks totaled $295.04 (R. 776). Defendant denied that the checks were given to him (R. 942).

When asked whether she had ever received any of this income, Newton testified:

> "Well, that is hard to say because I received some money of my own and I don't know whether it was all mixed up together." (R. 384)

Also she testified she received an income tax refund

from the withholding (R. 384).

There was no further showing that defendant received the benefit of these checks. The records of the corporation were not introduced so that it could be determined whether the checks were cancelled and the funds returned to the corporation. There was no evidence to show how much if any on account of these checks Newton had received mixed up with other moneys of her own.

In any event, the amount involved in these checks was so small, particularly in comparison with the unreported income asserted by the government in its summary on the night rentals and allowances, that it cannot be assumed that the jury would have convicted if this were the only issue submitted to them. Moreover, even adding the amount of these checks to income not put through the books, still the amount of such income does not equal the lump sum restorations to income, as we point out later.

6. Total income shown to have been received by defendant and not included in regular accounts did not exceed restorations to income.

Unless there was evidence on which the jury could have found beyond a reasonable doubt that substantial allowances and night rentals were received by defendant and not reported, the case should not have been submitted to the jury. When the evidence as above analyzed is considered together, it is evident that it does not support, beyond a reasonable doubt, a conclusion of unreported income. In fact, the

amounts established as having been received by defendant and not put through as regular bookkeeping entries were more than offset by the lump sum additions to income.

As pointed out above, allowances shown to have been deducted from income but as to which there was evidence that they were not actually received by the guests totaled $803.69 for 1945 and $2,756.98 for 1946. The 1945 allowance slips purportedly traced into deposits by Marx we do not add to this figure because based on material not in evidence or not traceable in the case of deposit slips in evidence. If we add, however, the $299.86 traced by Marx into deposits in 1946 to the amounts above stated, we arrive at $803.69 for 1945 and $3,056.84 for 1946, as to which there is some evidence to sustain a determination that the guests had not received the benefit of the allowances.

Nevertheless, as pointed out above, the lump sum restorations to income on the cash sheets and income tax returns totaled $3,475.73 in 1945 and $7,106.25 in 1946, substantially in excess of the improper allowances so established. There was no evidence to contradict defendant's testimony that these lump sum additions were made to restore to income on his tax returns the amounts withheld or removed from the ordinary records. In fact agent Marx gave defendant credit for the restorations made on the cash sheets but for some reason Marx ignored the additional amounts added to the returns despite the fact that they were not a duplication of the income restored on the cash sheets.

We have not, in this comparison, added anything to income not regularly entered in the books by reason of night rentals. This is because, as above pointed out, there was no proper proof of the amount of these night rentals. Nevertheless, even if we add an amount based on the assumption that the $7,200 total of these night rentals, as kept by Vowles on his written record, was received evenly month after month, there is still no unreported income shown. The figure of $7,200 was for the period of February 7, 1945, to July 1, 1947, approximately 29 months (R. 596, 633). This would be approximately $250 per month or $1,500 for the last six months of 1945 and $3,000 for the year 1946. Adding these to the allowance figures above mentioned of $803.69 for 1945 and $3,056.84 for 1946 we would get totals of $2,303.69 for 1945 and $6,056.84 for 1946, still under the restorations to income of $3,475.73 in 1945 and $7,106.25 in 1946.

While the government introduced as exhibits allowance slips totaling $14,959.84 in 1945 and $17,542.83 in 1946, it is speculation as to whether the allowances in evidence, other than those outlined above as to which there was specific evidence, actually inured to the benefit of the guests or whether they inured to the benefit of defendant and the case should not have gone to the jury for them to make such a speculation.

Myrtle Cole, public stenographer who had been a permanent guest in the years here involved testified that her bill would show a charge of $158 or $160 a month and then an allowance would be deducted which

brought it down to $90 per month (R. 873-874). She paid rental for another permanent guest and it was handled in the same way (R. 875). She had paid her bill in this manner to Newton (R. 875).

Also Ethel Beers, who has resided at the Claremont for twenty years, testified that her monthly bill would contain a charge of $183 or $185 from which an allowance was deducted leaving a net which she paid, which during O.P.A. control was $52.50. She likewise had often paid Newton on this basis (R. 877-879).

Examination of the guest ledger sheets in evidence discloses that a large number of the allowances, rather than constituting the amount of the bill of a guest checking out, as Newton's testimony would indicate, were of the type testified to by witnesses Cole and Beers—that is, they were credits on the accounts of long-staying guests, occurring during their stay rather than at a time of checking out, the credit being in an amount entirely different from the balance of the account on the day the credit was entered. The impression could be drawn from these ledger sheets therefore that the allowances represented reductions in the charges to long-staying guests to bring their actual payments in line with the O.P.A. ceilings. In this connection it is implicit in much of the testimony in the case that O.P.A. ceilings for long-staying or so-called "permanent guests" were less than for transient guests. If a guest started off at a particular rate per day and then stayed long enough to come under lower O.P.A. ceiling, a lump sum allowance of the kind found in the ledger sheets in evidence could be in

order so as to bring the rate charged from the beginning down to permissible levels. At the least we point out that there is nothing in the evidence which clearly prevents this as a possible inference in these instances.

Another indication of the unreliability of taking all of the allowance slips introduced as having inured to the benefit of defendant is that in spite of the testimony of Holtberg, to which we will later refer, that the allowance slips introduced contained no allowances to employees, plaintiff's exhibits 15, 72 and 73 in fact include $229.45 in 1945 and $861.82 in 1946 in allowances to the few employees mentioned by defendant in his testimony. See Statement of Facts, supra. There were 37 clerks alone in 1945 and 1946 (R. 896). On the basis of analysis of one month's allowances (July, 1946), defendant read a number of specific employee allowances from the allowance journal (Pltf.'s Ex. 9) and testified that allowances to employees would average $1,000 per month (R. 907, 908).

On appraisal of all these factors it is evident that any conclusion that defendant received the benefit of the amounts of allowances not specifically proven to have been received by him is pure speculation. There is not, in the record, proof from which a jury could find, beyond a reasonable doubt, that any of these allowance slips beyond those actually so proven were income of the defendant and the Court below should have sustained defendant's motion for judgment of acquittal at the conclusion of the trial.

B.

Exhibit 74 and Testimony of Agent Supporting it Usurped the Function of the Jury.

Even if there were sufficient evidence properly to take the case to the jury, nevertheless the issue as to whether defendant received unrecorded income in an amount greater than the income restored to the books and returns was one to be decided by the jury and the jury alone. Agent Holtberg, however, was permitted to testify both orally and by means of government's Exhibit 74 in a manner that usurped this exclusive function of the jury. He drew the speculation or inference as to the receipt of allowances and night rentals himself and despite the fact that his conclusions were his own personal opinion or perhaps, more accurately, were the government's contentions, they were given to the jury as if they were established fact.

Holtberg was, as we have pointed out, permitted to remain at government counsel table throughout the trial. He was the final witness for the government. He testified that he had heard all of the evidence introduced at the trial and from this evidence he had computed the net income and tax due thereon for the defendant for the years involved (R. 793). He identified a computation of this net income and tax (Pltf.'s Ex. 74 reproduced as Appendix F to this brief). Despite defendant's objections to this exhibit (R. 793, 795), duplicate copies were passed out to each juror (R. 795), even before it was admitted. It was later admitted (R. 825) and was sent to the jury room (R. 1130).

In his testimony and in plaintiff's Exhibit 74 Holtberg stated that on the basis of the documents and testimony in evidence which he had heard while sitting at the trial (R. 793, 794), there was unreported night rental income for 1945 of 184 days at $20 a day, or $3,680, and for 1946 of 365 days at $20 a day, or $7,300 (R. 796, 799). He likewise testified that there were allowances restored to rental income for 1945 of $14,959.84 and for 1946 of $17,542.83, these being the total of all allowance slips introduced in evidence (R. 797, 799). On this basis he testified that there was a tax deficiency of $4,120.45 for 1945 (R. 798) and $3,922.59 for 1946 (R. 803).

On cross-examination defendant's counsel tried to bring out that these conclusions of Holtberg were based on speculation and were not a computation based on income proved to have been received by defendant. He drew the admission from Holtberg that to the extent that an allowance in the documents in evidence was a legitimate allowance in which no cash came in, the item would come off his allowances (R. 809). Also Holtberg admitted that any cash recorded in the books from night rentals would come out of his computation and he said he recollected Vowles' testimony that the total of the memorandum Vowles kept was $7,200.00 (R. 808).

On redirect examination, however, Holtberg testified (R. 821):

"Q. Were any allowances to guests, to employees in any way included in the figure you have used?

"A. No, sir."

Also he testified on recross-examination (R. 822-823):

"Q. Do you know whether or not the documents in evidence, as you say, where allowances were made, cover the rooms occupied by employees?

"A. They do not.

"Q. They do not?

"A. The documents in evidence do not include ——the guest ledger sheets in evidence do not include the allowances to employees."

Moreover, on redirect examination Holtberg testified with reference to the total allowances contained in the allowance journal of the hotel in comparison with the lesser total of the allowance slips introduced in evidence, which Holtberg used for his computation, in such a manner as to make it appear to the jury that all allowances where employees or guests had actually received the benefit had been taken out and that Holtberg had used only allowances as to which the proof left no question that defendant and not the guest or an employee had received the benefit (R. 817-822).

With regard to the computation of unreported night rentals at $20 a day, Holtberg testified that he was using the testimony of Mr. Vowles as computed by Mr. Marx (R. 796). Marx testified as follows (R. 777):

"A. (Continuing) As I recall Mr. Vowles' testimony he stated that on an average that five to

six rooms were rented each night and not recorded, and that he would estimate the amount to be between $20 and $30 a night. Now I have made a computation based on this minimum estimate feeling that——

"The Court. Regardless of what you felt about it you took his minimum?

"The Witness. That is correct.

"A. (Continuing) In 1945 from July 1 to the end of the year we have 184 days at $20 a day or a total unreported income of $3,680. For the year 1946 we have 365 days at $20 a day totaling $7,300 in unreported income. . . ."

Thus on the two issues heretofore discussed as to which if there were to be a conviction, it was necessary for the jury to infer that defendant received amounts of income in excess of restorations (our basic position being that what would be required would be not an inference but a speculation), Holtberg, with the assistance of Marx, in effect took these crucial issues away from the jury and made it appear unnecessary for the jury to try to recall the basic testimony and exhibits to determine for themselves whether defendant did or did not receive such income. Holtberg specifically told the jury that the total of the allowance slips in evidence which he had used for his figures, did not include any allowances to guests or employees. If not, then it appeared that defendant and not guests and employees had received the benefit of these allowances so that it was not necessary for the jury to give the matter any further thought.

In thus making his own inference appear to the jury as established fact, Holtberg testified not only improperly but also incorrectly. While it is not possible on this record to determine how much of the allowances benefited the guests and employees and how much benefited defendant, it is clear that the allowance slips used by Holtberg included allowances to employees, as previously pointed out.

Moreover, as to Mr. Vowles' testimony on the night rentals, we have heretofore mentioned that to take $20 a night for every night is entirely improper because Mr. Vowles' testimony indicated clearly that all of the night rentals were regularly put on the books during periods of time, the length of which the government did not show, and for the further reason that Mr. Vowles' written record casts substantial doubt on the accuracy of this estimate of $20 a night. Yet not only agent Marx, but the Court itself, in the above quotation from the record, in effect tells the jury that $20 a night is the minimum that defendant received on account of these night rentals.

There is, of course, a proper function to be performed in criminal prosecutions for tax evasion by expert revenue agent accountants in summarizing entries in complicated books of account and other evidence. The Supreme Court has so held in *United States v. Johnson,* 319 U.S. 503, 87 L. Ed. 1546, and this Court has recognized the field for such testimony in two recent cases. *Barcott v. U.S.*, 169 F.(2d) 929 (C.A. 9), and *Gendelman v. U.S.*, 191 F.(2d) 993 (C.A. 9).

Where such testimony is offered without hypothetical questions the courts have been careful to analyze the type of summary testimony given by the agents to make certain that the province of the jury is not usurped. Particularly has this been so in recent years with the very large increase in the number of tax evasion prosecutions, and since the Supreme Court in *Holland v. United States,* 348 U.S. 121, 127-128, 99 L. Ed. 150, 160 (1954), so cogently pointed out the danger in these cases:

> ". . . where the jury, without guarding instructions, is allowed to take into the jury room the various charts summarizing the computations; bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them."

The Third Circuit in *United States v. Ward,* 169 F(2d) 460 (C. A. 3) has, as we have previously mentioned, held that an agent testifying as an expert may not usurp the exclusive function of the jury to weigh the evidence and determine credibility, by testimony in which he makes use of materials not in evidence and accepts some witnesses' testimony and rejects others as "uncertain."

The Fifth Circuit in *Steele v. United States,* 222 F. (2d) 628 (C.A. 5), a net worth tax evasion prosecution, reversed the conviction because of the summary testimony of the expert agent. The objections to the testimony and the exhibit prepared by the agent was that there were omissions, interpretations and discrepancies between the record and these exhibits and that

the agent did not merely attempt to summarize the testimony, but on the contrary, undertook to evaluate it, endeavoring to pass upon the reliability and credibility of certain witnesses, and to determine what weight should be given to their testimony. The Court stated that it was not under any circumstances proper for these compilation exhibits to be taken to the jury room, and further pointed out that the case was not a simple and uncomplicated case where summaries would be proper. The same Circuit in *Lloyd v. United States,* 226 F.(2d) 9 (C.A. 5), found it unnecessary to decide whether the testimony of the agent summarizing the case was reversible error since the case was being reversed on another ground. Nevertheless, the Court stated (p. 17):

> "The use of this type of evidence, however, has inherent dangers to an accused, for a jury is often unfairly and unduly impressed by the apparent authenticity of a government witness chart computation, as such, rather than by the truth and accuracy of the underlying facts and figures supporting them. A trial court is charged with grave responsibilities in such instance to insure that an accused is not unjustly convicted in a 'trial by charts,' however impressive the array produced. . . . Whenever possible such charts should be confined in their preparation to strictly mathematical computations, subject to detailed explanation upon the trial by the testimony of expert government witnesses, . . ."

The Second Circuit in *United States v. Altruda,* 224 F.(2d) 935 (C.A. 2), reversed a conviction for tax evasion on the ground that the exhibit filed as a sum-

mary by the expert agent did not take into account important facts shown by the government's own evidence. The Court stated (p. 942):

> "It was not an analysis of the net worth increase or a computation of fraudulently unreported income which conformed to the government's evidence, and it did not fully state the facts."

It is evident that the courts, as these tax evasion cases multiply, while continuing to permit the summary testimony by accounting experts representing the government, are examining that testimony carefully to make certain that it is what it purports to be, merely a summary of actual facts and figures in the record and facts and figures which, at least on the government's own presentation, are not seriously in doubt. Unless the testimony is presented on hypothetical questions which warn the jury of the inferences or assumptions being made, this type of testimony can be exceedingly unfair and damaging to a defendant because the jury is apt to take the testimony as factual evidence of the conclusions stated.

In the case at bar, Holtberg was qualified as a certified public accountant and could properly testify as an expert on any accounting problem. He could properly have testified to the totals of the allowance slips and ledger sheets introduced, and if he wished to divide them into categories based on some difference in the entries on them, then he could have given the totals for each category and could have described them. He could also properly trace entries through the books. If asked what the tax would be if the jury

were to find that the amount of all allowance slips introduced had actually been paid to defendant and none of them had benefited the guests or employees, he could have computed the figure.

The question of whether the guests and employees or the defendant received the benefit of the allowance slips introduced was not, however, an accounting problem. There was nothing that could be extracted by an accountant from the books, records or testimony which would resolve this question. In fact, as far as the accounting records went, they showed that the guests received the benefit of all of these allowances. If Holtberg were really testifying as an expert accountant and confining himself to that which the books and records disclosed to an accountant, he would have had to testify that the records showed that the guests received the benefit of the allowances. When he told the jury, both by his exhibit and by positive oral testimony, that neither the guests nor the employees received the benefit of any of these allowances, he was not testifying as an expert accountant summarizing books and records, but he was speculating or making an inference or drawing an opinion of his own. He was generalizing so as to apply to all of the allowances the conclusions that he drew as to some of the allowances from the testimony of some of the witnesses. In so doing he ignored the testimony of all of the witnesses that, along with the giving of improper allowances, there was likewise the giving of proper allowances where the guests and the employees actually received the benefits thereof.

What happened here is no different from calling a witness in a murder case where the prosecution's proof showed some circumstances indicating that the accused committed the murder, and other circumstances indicating that someone else committed it, and having the witness testify that he was an expert on crimes, that he had listened to all the evidence, and that it was proven that the accused committed the murder. This would be a clear invasion of the province of the jury. Yet here, also, the government contends there are some circumstances that could be taken as indicating that defendant received the benefit of these unproved allowances. There are other circumstances indicating that the guests and employees might have received the benefit. The government put on a witness who testified that he was an expert on accounting, that he had listened to all the evidence and that it was proven that the defendant had received the benefit of all of these allowances and that the guests and employees had received none of them.

The prejudicial effect of this testimony is very great. It was strongly impressed upon the jury by the distribution to the jurors of duplicate copies of plaintiff's Exhibit 74 during Holtberg's testimony. This was not done, as far as we can determine, in the case of any other exhibit. The exhibit was sent to the jury room where it constituted the only summary of the case before the jury. Moreover, this testimony enabled the government counsel in his argument to the jury to state (R. 1057-1058):

"Now these allowances were totaled up by Mr.

> Holtberg and I believe explained to you and they totaled, the entry charged back in each year $14,900, allowances in the Claremont Hotel in 1945, and they were taken from these allowance slips attached to the ledger sheets. . . . That is in there and all of these where there is positive identification and not subject to any claim of legitimacy of allowance for employees or anything else. That is $14,900 in 1945, $17,500 in 1946 and $4,519 in 1947."

As we have above shown, the $14,900 in 1945 and $17,500 in 1946 was not proved to have been received by defendant. Only a small portion as above set out was actually identified in this respect whether by Mrs. Newton or by any of the other witnesses. Even if Newton's general testimony about plaintiff's Exhibit 15 were thought to be evidence that defendant had received the benefit of those allowances, it still would not reach anything like Holtberg's totals. The $14,900 and the $17,500 figures are totals of all the allowance slips in evidence, namely plaintiff's exhibits 13, 14, 15, 16, 17, 46, 49, 51, 55, 60, 72 and 73 (R. 797).

We cannot think of any better way to take a crucial and doubtful issue from the jury. The unfairness to the defendant which resulted was not in any way corrected by the Court below. In fact, during the examination of Holtberg, the Court by its own questions emphasized to the jury that the income testified to by Holtberg was the minimum that there could be on the evidence introduced. The Court stated (R. 801):

> "Let me see if I understand it. From the figure $24,842.00 you have deducted or taken out all items

as to which there is no evidence indicating that it was not a proper charge, is that in effect what you mean? Or to put it another way, the remainder of $19,736.00 is the total of all the items as to which there is evidence indicating that the item was not properly carried, is that correct?

"Witness: That would be the net minimum figure, yes.

"The Court: Is that clear to all of you?"

Nor did the Court below clear up the matter in its instruction as to this summary, which was (R. 1124-1125):

"There have been admitted in evidence certain exhibits, variously referred to here as schedules or summaries. Strictly speaking these exhibits are not received as evidence themselves, but are admitted as a summary of the evidence admitted in the case and the summaries are admitted only for your assistance and convenience in considering the other evidence which they purport to summarize. Exhibits of this nature are permitted where they are based upon voluminous books, records or documents, but you are reminded that it is the books, records and documents which are the evidence and the summaries are admitted only to assist you in considering the evidence, and for that purpose you are entitled to consider them."

This instruction intimates that Holtberg's Exhibit 74 is an actual summary of the evidence admitted in the case and is based upon the books, records or documents. There was no pointing out to the jury that it was based on an inference which Holtberg saw fit to

draw from conflicting general evidence and was, in fact, contrary to the actual records and books. There was no indication in this instruction that, after Holtberg's testimony, the jury still had to go back to the basic testimony and exhibits to determine whether defendant had received income represented by allowance slips which exceeded his restorations to income.

Nor did the Court's instruction with regard to expert witnesses cure the matter. The instruction was (R. 1128-1129):

> "In this case certain persons including government agents and accountants qualified as experts and testified. When a person is called as an expert witness in a particular field of knowledge or learning and is allowed to express opinions, those opinions are for the aid and assistance of the jury but not for the purpose of invading the jury's function. The testimony of an expert witness in so far as it is based upon his personal observations of particular facts and conditions is to be considered by you just the same as that of any other witness but the opinions of experts based on hypothetical assumptions of fact do not tend to prove the facts upon which they are based.
>
> "The jury is not bound to find according to expert testimony, but it should be considered by you in connection with all the other evidence in the case. The responsibility to decide rests upon the jury and it is your duty to evaluate and appraise the testimony of the witness who expresses an opinion precisely as you would evaluate and appraise the testimony of a witness who testifies to facts within his personal knowledge.

> "It is for you in the light of all the circumstances disclosed during the progress of the trial to place that weight upon and give that credit to the testimony of each witness whether an expert or otherwise, which you conscientiously believe in the exercise of sound judgment and good sense it is fairly entitled to receive at your hands."

Since there was no indication that Holtberg's positive testimony as to receipt of income by defendant was based on hypothetical assumptions of fact, and certainly the argument of government counsel did not so indicate, the purport to the jury of these instructions would be that Holtberg's testimony was to be given the same consideration as that of any other witness. His testimony in this regard was not clearly opinion testimony, and there was nothing in this instruction that apprised the jury that Holtberg's testimony was simply his inference and that they still had the duty of deciding what if any inferences they themselves should draw.

The entire manner in which these cases are tried emphasizes the cautionary note sounded by the Supreme Court in *Holland v. U. S.*, 348 U.S. 121, 99 L. Ed. 150 (1954), where it took pains to reiterate the necessity of making certain that defendants in tax evasion cases receive fair trials. Defendant here, for example, had interests in two hotels and other properties during the years involved. Myriads of rentals to guests and other transactions were involved. The indictment merely alleged that he had understated his income. A motion for a bill of particulars before trial was denied (R. 8.). The books and records had been in the pos-

session of the government for the entire four years prior to trial (R. 99). Thus the defendant in this, as in most of these cases, started trial not knowing exactly what matters the government would rely upon. Even during the evenings and the one weekend of the trial, the books and records were, a large part of the time, in the hands of the government (R. 143, 425, 703, 753-754, 1029). There is little time during the trial for a defendant to prepare from voluminous records of this sort an adequate defense in a case where the government introduces and relies upon a great volume of small transactions. Even if the defendant had been able to get access to the books before trial, in the absence of knowledge of the points being relied upon by the fiovernment, he would have been faced with an insuperable obstacle. Had he wished to prepare himself to meet a possible attack on allowances, he would have had to contact thousands of witnesses scattered all over the United States, whose present addresses were unknown.

The trial situation in a case like this is one in which fairness requires that the government be held strictly to proof that the defendant did receive the benefit of the allowances given by the hotel during this period, and, further, fairness requires that, if any inferences are to be drawn going beyond the strict proof, the jury be permitted to draw those inferences from the facts and evidence properly introduced without having a revenue agent testify positively that no inference was required, that the income was proved to have been received by defendant and without having that con-

clusion reinforced by the placing in the hands of the jury of a written exhibit, showing totals as being fully established.

We submit that the testimony of Holtberg, assisted by Marx, invaded the province of the jury and withdrew the crucial issue in the case from the jury, and that this constituted plain and reversible error.

C.
Financial Statements and Evidence Based Thereon Were Improperly Admitted.

As a part of the government's case, agent McCarthy identified statements of defendant's financial position in 1938 and on December 31, 1948, supplied by defendant to the agents (R. 739, Pltf.'s Ex. 71). The Court below admitted these over defendant's basic objection, which was that the documents were incompetent, irrelevant and immaterial until the *corpus delicti* was established (R. 66, 740). Since the government did not proceed on a net worth basis, the *corpus delicti* to justify the introduction of this exhibit was never established.

The issue here was whether allowances and night rentals in 1945 and 1946 were received and unreported. While at the time these exhibits were introduced the years 1947 and 1948 were also then involved, the issues for those years likewise dealt with receipt of specific items of income. Defendant's financial statements in 1938 and 1948 had no relevance to these issues unless the government intended to and was prepared to trace the amounts of his net worth for each year and show

unexplained increases in this net worth in the years in question, which would be some indication that defendant had received the disputed income. The government made no attempt to do this, so that the independent corroborative evidence required to permit introduction of admissions of net worth was never introduced. *Smith v. United States,* 348 U.S. 147, 156, 99 L. Ed. 192, 75 S. Ct. 194 (1954); *United States v. Calderon*, 348 U.S. 160, 163, 99 L. Ed. 202 75 S. Ct. 186 (1954).

The purpose of the government in introducing these financial statements was made clear in the opening statement (R. 52-53). This purpose was to make it appear to the jury either that these financial statements were false or that certain financial statements given to banks and certain statements made in documents in the 1920's and 1930's were false.

Immediately after offering and securing the admission of plaintiff's Exhibit 71, the government re-offered exhibits 27, 31 and 38 and secured their admission over the renewed objection of the defendant that they were incompetent and immaterial (R. 127, 136, 141, 740-741). These exhibits were financial statements given by defendant to banks in Seattle in the years from 1945 to 1948. Government counsel then read at length to the jury plaintiff's exhibits 71, 27, 31 and 38 (R. 741-747). The purpose was to show the difference in net worth between the statement submitted to the agents and the statements submitted to the banks.

The statements to the banks did not disclose any additional assets of material nature over those disclosed

in the statement to the agents. Giving allowance for the difference in dates of the statements, the same assets are there but they are valued on an entirely different basis. The statement to the agents (Pltf.'s Ex. 71) is on a cost basis. The statements to the banks are on asserted fair market value. For example, plaintiff's Exhibit 71 shows the Claremont Hotel plus furniture and automobiles at a cost on December 31, 1948, at $305,541.08. Plaintiff's Exhibit 38, the financial statement submitted to the Peoples National Bank as of December 1, 1948, the closest one to December 31, 1948, showed the Claremont Hotel plus furniture, but not including automobiles, at a fair market value of $1,500,000. See R. 758-759, 933-934. Since fair market value is anybody's guess, there was certainly nothing in the fact that defendant put a large fair market value on his property in his statements to the banks that is in any way relevant or material to the issues involved in this case. Another vital difference between these financial statements is that on the financial statements to the banks defendant omitted some of his liabilities. In the statement to the agents of December 31, 1948, there is a careful listing of all of his liabilities. The fact, however, that defendant would file statements with the banks as to his financial position without listing all of his liabilities likewise was not sufficiently similar in kind to be proper evidence that the precise items of income involved in this case were received by defendant and were not reported.

On cross-examination of defendant the government went even further afield. Defendant was questioned

concerning statements made by him to agent McCarthy that he had as much as $40,000 by 1920 (R. 966-967); concerning his employment in the post office from 1920 to 1924 at $1,600 per year (R. 967); concerning $6,500 in old coins accumulated prior to 1920 and appearing on the 1938 financial statement (R. 969, 980); concerning $9,000 left with his father in 1919 (R. 969) and concerning a petition in bankruptcy filed by him in 1925. The petition for bankruptcy was marked as plaintiff's Exhibit 79. Defendant's counsel objected on the ground of immateriality (R. 970). The Court, without admitting the exhibit, permitted government counsel to read the contents of the bankruptcy petition to the jury in the form of questions, requiring defendant to admit the filing and contents of the petition (R. 970-973).

Defendant was then questioned concerning the whereabouts in 1925 of assets listed in his 1938 financial statement as accumulated prior to 1925 but not listed in the bankruptcy petition (R. 973-974). Defendant testified that old coins had been lost in an old trunk and that his father, with whom he had placed $9,000, had disappeared (R. 974). Defendant was questioned as to how he had earned the $9,000 between the time he was 14 and 17 years of age (R. 974), as to how he earned $16,000 to give to his mother in 1920 (R. 975), and as to how the money came back from his mother after her death in 1943 (R. 976).

Defendant was then questioned as to a loan he stated he made to Carl Baron in 1927 of $5,000 and as to how he had secured the money (R. 977); as to a loan to Al

Crock of $5,000 in 1938 (R. 977); as to sale of household goods in 1938, 1939, 1940 and 1941 in Oklahoma City for $8,500 (R. 977); and as to guns listed on his 1938 financial statement but not on his 1925 petition for bankruptcy (R. 978).

Defendant was then questioned as to the number of lawsuits he had been in (R. 978-979, 988), and particularly as to a suit against him in 1938 by the Bell Fuel Company for a $249 fuel bill (R. 979). The judgment in this case was marked as plaintiff's Exhibit 80 (R. 980) but excluded (R. 1004) because government counsel had brought out all the facts through questioning (R. 985-987) as permitted by the Court after objection by defendant's counsel to plaintiff's Exhibit 80 (R. 984-985). Government counsel by his questions brought out that this judgment was at the same time that the 1938 financial statement indicated defendant had substantial amounts of cash (R. 987).

Defendant was asked to identify his signature on an affidavit in 1928 in which he stated that he was entirely without funds and asked welfare aid for his wife. After defendant's objection to reading from this document on the ground that it was incompetent, irrelevant and immaterial, completely prejudicial, and having no reference to any issue in the case, the Court permitted the affidavit to be read to the jury without being marked or introduced (R. 981-984). Defendant was again questioned about his loan of $5,000 to Baron in 1927 (R. 984).

Defendant was questioned as to borrowing $300

from his mother in 1938 and about a mortgage on a trailer taken by his mother as security (R. 984-987).

Defendant was then questioned about his business transactions after 1948, including trades by which he acquired stock in some Idaho banks, an interest in a hotel and property in Santa Barbara, and a theatre and beach home in Cheney, Washington (R. 987-991). He was questioned about the amount of income taxes he had paid since 1948 and in connection therewith the status of the capital gains tax payable on his sale of the Claremont Hotel in 1951, defendant stating that his accountant had advised that there would be a tax of $200,000 payable as defendant received installments of the purchase price but government counsel attempting to make it appear that he had failed to pay his proper tax (R. 991-994). Objection by defendant's counsel that defendant's taxes after 1948 were immaterial and that the trial should be confined to the years involved was overruled (R. 992-993).

Defendant's income tax returns for the years 1940-1943 were read in detail to the jury (R. 949-964) and the tax he paid each year, including 1949, was outlined (R. 992).

In a tax evasion case based on net worth, the government properly may go into detail as to the defendant's assets and liabilities for years long prior to the indictment period if they bear on the beginning net net worth for the period under consideration, and thus have a relevancy to the case. Where the prosecution is on the basis of the receipt by the defendant of cer-

tain specific items of income in the particular years, however, the assets and liabilities of the defendant and his statement concerning the same for years far removed have no relevance and introduction of such evidence is error.

In *Wolcher v. U. S.*, 200 F.(2d) 493 (C.A. 9), a tax evasion case, this Court pointed out that, to be admissible, prior wrongful acts must be similar to the one now charged, quoting *Boyer v. U. S.*, 132 F.(2d) 12, 13 (App. D.C.) to the effect that the other alleged bad acts must be so connected with the offense charged in point of time and circumstances as to throw light upon the intent. This Court further held that it was error to admit a copy of an accountant's tentative partnership return for the reason that it was in no way connected "in point of circumstances" with the offense charged in the indictment.

In *Lloyd v. U. S.*, 226 F.(2d) 9 (C.A. 5), a specific item tax prosecution for the years 1945, 1946 and 1947, the government introduced statements given by the defendant to the agent concerning his assets and liabilities for the period 1924 to 1932. The government then introduced further evidence in an attempt to show that the facts stated concerning these assets and liabilities were untrue. The court held that this evidence was inadmissible and highly prejudicial and reversed the conviction because of it.

In Hartman v. U. S., 215 F.(2d) 386 (C.A. 8), a specific item tax evasion prosecution for the years 1945 and 1946, the court held that it was prejudicial

error for the prosecutor to have put into evidence a long list of irrelevant matters even though some of them were of small moment, which tended to arouse suspicion that defendant had been guilty of misconduct in respect to his income taxes and to excite prejudice against him, but which did not tend to prove the charges of the specific items in the indictment. These matters included the formation of a family partnership, failure to report items that the defendant's accountant had failed to take off the books, and padded expense accounts for years prior to the indictment years, the specific items in the indictment years for which he was being prosecuted not having anything to do with any of these matters.

In *Blumberg v. U. S.,* 222 F.(2d) 496 (C.A. 5), a specific item tax prosecution, the government introduced evidence that defendant's wife took to New York in a hand satchel $30,000 in cash and had a tremendous wedding for her daughter. This evidence did not tend directly to establish any of the specific items charged in the case. The court reversed the conviction on the ground that this was improper and prejudicial error.

A great part of the present trial was taken up by the mass of testimony and exhibits concerning financial affairs of the defendant for years long prior to the indictment period, and with the financial statements of defendant to the banks, which were within the indictment period but which like the earlier material served no purpose in the case other than to attempt to prejudice the jury against the defendant. None of this evi-

dence showed that defendant had received more income than was reported on his returns for the years involved. If it had, undoubtedly the prosecution would have used the net worth method in this case. None of it indicated in even the remotest degree whether or not the defendant or the guests and employees received the benefit of the allowances.

The irrelevant and immaterial evidence so admitted was used by government counsel in argument in a manner that emphasizes clearly its impropriety and prejudicial character. Government counsel stated (R. 1090-1093):

> "There is another one, the statement of Mr. McCarthy. Why would he tell Mr. McCarthy about these financial statements? Why? Because the financial statements were, in the eyes of Mr. Corbett, supposed to explain how he could go into these transactions in 1948 of $110,000, and because he had not reported anything as was shown on his tax returns from 1940 to 1948, or a negligible amount, he has to show a loss, so he makes these statements, financial statements to Mr. McCarthy in order to convince him in the course of his investigation that his financial statements are true and that his tax returns are true. And his reason for those financial statements where he shows a loss of some hundred thousand dollars in the course of these years, the reason is to get Mr. McCarthy to believe that his financial statements confirm the false tax returns.
>
> "Now compare that with the financial statements given to the bank. Now what is the reason he tells the bank that? He says, 'Oh yes, it is true that I

am worth $28,000 in 1948, but it is also true I am worth $2,500,000.' And what is his explanation? One is a trading value and one is a cost value. He went over that one pretty fast. Now the financial statements are not, to the bank, are not to be considered as any evidence of income, but they are to be considered as another statement given about the same time as to whether or not Mr. Corbett was telling the truth when he made the statement to Mr. McCarthy or was he in fact attempting to make another false statement to the government agencies, an attempt to convince the government that his false returns were true.

"Now those statements in 1938, we had quite a time with that yesterday. We went through those and that brings us up also to the statements he made to you. Now he had gone through these statements with Mr. McCarthy. Now when Mr. Corbett testified yesterday he was confined unfortunately by about three things. First, he had to account for a bankruptcy petition that he had filed in 1925. He had to account for an affidavit he made in 1928. He had to account for the statement he told Mr. McCarthy what he was worth in 1938. He had to account for the fact that he was, made an affidavit of being on welfare, that he had made, been sued for $200.00 fuel bill. He had to account for the bank statements. Now that is sort of tough to work your way around especially when you give a statement that you are worth $110,000 in 1938 and you are sued for a fuel bill for that small amount. It is tough to account for being worth $110,000 and having all that cash on hand and $7,000 in travelers' checks and all the rest of that, when you borrow $300.00 from your mother to come out here from Okla-

homa and she takes a mortgage on your trailer. Now that is pretty hard to explain, especially when you say that is the mother you left some $16,000 worth in 1920. It is pretty hard to explain that, but he tried and we had $6,500 kicked from the attic down to the garage and back again stuck somewhere in a box, a trunk and finally tools, $6,500 in old coins. What he had to do, he had to have it in 1920 because that is what his statement said. He couldn't have it in 1925 because then his petition of bankruptcy is false. He can't have it when he can't pay his bills, so he finds it somewhere around in there and disposes of it, something to do with just before the bank crash.

"He has to account for $25,000 he says that he loaned his parents. His father had left when he was two. He comes back when he is sixteen and by that time he has $30,000 he has won while he is working as a cook. He gives his father $16,000 and the sheriff has to get the——all of these things to go to what you can judge is this man telling the truth?"

The Court in its instructions in no way cured the prejudicial effect of this testimony and this argument. The Court instructed (R. 1123-1124):

"Financial statements given by the defendant to various banking institutions during the indictment years have been admitted in evidence. These statements were admitted and can be considered by you for two purposes only. First, you can consider whether these statements conflict with the statement given by the defendant to the Internal Revenue Service during the investigation. If you

find that there is a conflict in these statements, you may only consider such conflict as bearing upon the truth of the statement to the investigator. If you find the statement to the investigator was not truthful, you may then consider this fact as bearing upon the credibility and intent of the defendant with respect to the failure, if any, of the defendant to report income and tax due thereon in the defendant's tax returns for the years with which we are concerned.

"Now secondly, I am still talking about these financial statements, secondly you may consider whether the financial statements bear upon the knowledge of the defendant as to his true financial position and the propriety and accuracy of the bookkeeping methods under which the defendant's financial transactions were recorded in his books and from which books defendant's income tax returns for the years in question were prepared.

"You may also consider such knowledge as bearing upon his intent, if any, to conceal income and evade tax. You are instructed, however, that these financial statements standing alone are not proof of any unreported income of the defendant in any of the years '45, '46 and '47. They should not be considered in your deliberations as purporting in and of themselves to show that any unreported income was received by the defendant in any year in question. The statements can only be considered for such bearing, if any, as you may find them upon the knowledge and intent of the defendant in filing his returns, if you find from other evidence in the case that there was unreported income and tax liability in said returns.

or not reported in said returns."

We submit that in introducing as a part of its case the financial statements of 1938 and 1948 which were themselves irrelevant and immaterial and then taking up a great part of the record with highly prejudicial testimony and exhibits having no relationship to the case and no purpose except to try to show that the two financial statements were incorrect, the government went far beyond that which is permissible in a specific item tax prosecution and the Court erred in failing to sustain defendant's objections to the financial statements and to the other evidence.

CONCLUSION

We urge that the case be reversed with instructions to the Court below to enter judgment for the defendant on the ground that insufficient evidence was introduced by the government for a conviction, or in the alternative that the conviction be reversed and the case sent back for a new trial.

Respectfully submitted,

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APPENDIX A

SUMMARY OF TESTIMONY OF GUESTS ON ALLOWANCES

1945 ALLOWANCES

Name	Record Page Number	Date	Allowance
Mrs. George Jorgensen	324	August 19, 1945	$ 26.50

1946 ALLOWANCES

Clare A. Mulvihilll	487	April 29, 1946	42.35
			36.10
Winnifred K. Lein	489	July 14, 1946	52.96
Nora Longtin	493-494	March 13, 1946	39.05
		April 14, 1946	42.85
		May 15, 1946	42.90
Robert R. Campbell	495	March 2, 1946	51.90
Boyd B. Stevenson	499	July 8, 1946	14.25
Paul H. Giese	501	January 2, 1946	1.88
		January 11, 1946	38.05
Robert K. Lavery	503	March 21, 1946	63.82
Lt. Herbert A. May	506	July 2, 1946	25.58
	507	July 16, 1946	55.30
Robert Quinn McCown	509	February 23, 1946	50.50
Mrs. Don H. Miller	517	January 19, 1946	46.57
Mrs. George Jorgensen	524	June 6, 1946	12.20
Edward H. Fritzsche	526	January 30, 1946	63.53
Jacob W. Hoover	528	March 15, 1946	27.85
Margaret F. McCaffrey	530	March 19, 1946	50.22
William Currie	532	July 2, 1946	48.96
Peter Norman Holm	535	May 31, 1946	31.82
Harry Clifford Butterworth	538	April 3, 1946	78.10
Arthur H. Eckels	540	January, 1946	45.76
		1946 Total	$962.50

APPENDIX B

SUMMARY OF TESTIMONY OF EMPLOYEE BERNICE MORGAN ON ALLOWANCES

(From Exhibit 13)

Name	Record Page Number	Date	Allowance
G. L. Holmes & Mathews	158	January 15, 1946	$ 44.14
Cameron	163	———	44.00
Eckels	163	———	45.76
Brisbois	163	———	59.59
Shaskain	164	April 3, 1946	127.56
	164	———	39.38
Helmis	164	———	50.00
Petersen	164	———	39.24
Carlson	164	———	40.77
Steinberger	164	———	32.82
Lt. and Mrs. Hite	164	———	32.10
	164	———	50.00
F. B. Johnson	164	March 19, 1946	92.40
F. B. Johnson	299-259	March 27, 1946	54.50
			$752.26

APPENDIX C

SUMMARY OF TESTIMONY OF EMPLOYEE LORETTA NEWTON ON ALLOWANCES

(From Exhibits 15, 45, 46, 47, 48, 49, 51)

1945 ALLOWANCES

Exhibits 48, 49

Name	Record Page Number	Date	Allowance
Store No. 1	390 and 453	Nov. 29, 1945	$100.00

1946 ALLOWANCES

Exhibit 15 (47)

F. B. Johnson	358	April 8, 1946	79.03
A. R. Butterworth	359	April 1, 1946	78.10
Al Anderson	360	March 2, 1946	266.38
Robert McDowan	361	February 23, 1946	50.50
Mrs. Don H. Miller	376	January 19, 1946	46.57
		Total Exhibit 47	$520.58

Exhibits 45, 46

Hotovitzky	369 and 420	April 27, 1946	38.70
Thorpe	369 and 450	April 28, 1946	38.00
Larson	370 and 450	April 28, 1946	40.52
Mr. and Mrs. K. Pearson	370 and 451	April 29, 1946	61.95
Ralph Stackum	370 and 452	April 29, 1946	36.15
Rm. 915	376	May 1, 1946	43.26
		Total Exhibits 45, 46	$258.58

Exhibit 51

Fink	450 and 470		36.70
Arnold	464-465	March 27, 1946	45.20
Fink	464-465-477	March 27, 1946	43.33
		Total Exhibit 51	$125.23
		Total for 1946	$904.39

APPENDIX D

SUMMARY OF TESTIMONY OF ARTHUR BAUMAN GOVERNMENT EXPERT ON FUMED PHOTOGRAPHS

(From Exhibits 52-62)

1945

Ex. No.	Name	Record	Date	Amount
52	Whitten	549	August 14, 1945	$ 15.44
53	Petersen	551	August 15, 1945	32.00
54	Jenkins	553	December 20, 1945	44.54
55	Stolfi	556	December 21, 1945	52.49
55	Franki	556	December 21, 1945	50.32
56	Cacy	557	December 23, 1945	38.15
57	Jenkins	558	December 28, 1945	44.40
57	Bersaker	559	December 28, 1945	46.95
58	Sandwick	561	December 31, 1945	122.66
58	Chiswell	562	December 31, 1945	57.11
58	Geissler	563	December 31, 1945	62.58
	Total 1945			$566.64

1946

59	Douglas	563	January 3, 1946	91.32
60	Fanning	564	January 5, 1946	52.60
60	Savage	567	January 5, 1946	40.50
61	Hayes	569	January 9, 1946	33.09
61	Downey	570	January 9, 1946	43.05
62	Petersen	571	January 11, 1946	39.24
62	Atherton	572	January 11, 1946	51.06
62	Giese	572	January 11, 1946	38.05
	Total 1946			$388.91
	Total 1945 and 1946			$955.55

APPENDIX E

DUPLICATIONS OF WITNESSES TESTIFYING TO SAME ALLOWANCE

Ex.	Name	Date	Witness #1	Witness #2	Amount
			1945		
52	Whitten	8/14/45	Bauman (R 549)	Vowles (R 617)	$ 15.44
				Total 1945	$ 15.44
			1946		
15	Albert R. Butterworth	4/3/46	Harry Clifford Butterworth (R 538)	Newton (R 359)	78.10
13-62	Petersen	1/11/46	Morgan (R 164)	Bauman (R 551)	39.24
62	Paul M. Giese	1/11/46	Giese (R 501)	Bauman (R 572)	38.05
15	Robert Quinn McCown [Robert McDowan]	2/23/46	McCown (R 509)	Newton (R 361)	50.50
15 [47]	Mrs. Don Miller	1/19/46	Mrs. Miller (R 517)	Newton (R 376)	46.57
13	Arthur H. Eckels	1946	Arthur Eckels (R 540)	Morgan (R 163)	45.76
				Total 1946	$298.22

APPENDIX F

(Excerpt from Plaintiff's Ex. 74)

BILL CORBETT — YEAR 1945

Computation of Corrected Net Income and Tax

Income per Return Filed		
Wages		$ 2,668.62
Dividends and Interest		375.00
Other Income—Sundry, Wagering, etc		700.00
Business Income—Claremont Hotel		6,777.86
Community Share—Adjusted Gross Income		$10,521.48
Less: Standard Deduction per return		500.00
Community Share—Net Income per return		$10,021.48
Add: Unreported Room Rental Income—184 days @ $20.00	$ 3,680.00	
Salary from Claremont Apt. Hotel Corp. to Loretta Newton as Corp. officer to Bill Corbett	$368.80	
Less: 20% Withholding Tax	73.76	295.04
Allowances, Claremont Apt. Hotel, restored to rental income		14,959.84
Total Additions to Income		$18,934.88
Less: Unidentified Cash Overages and Transient Room Rentals restored to income on books		1,465.73
Total Additional Net Income		$17,469.15
Less: One-half community income to wife		8,734.57

(Please turn the page)

One-half of the Additional Net Income to Bill Corbett		8,734.58
Corrected Net Income (Bill Corbett)		$18,756.06
Income Tax on above Corrected Net Income		$ 6,883.39
Tax as computed above	$6,883.39	
Tax per return	2,762.94	
Tax Deficiency	$4,120.45	

BILL CORBETT — YEAR 1946
Computation of Corrected Net Income and Tax

Income per Return Filed		
Wages		$ 3,600.00
Interest		1,140.50
Other Income—Sundry, Wagering, etc.		2,000.00
Business Income—Claremont Apt. Hotel		12,359.00
Total Community Adjusted Gross Income		$19,099.50
Less: One-half Community Income to Wife		9,549.75
One-half Community Share Adjusted Gross Income		9,549.75
Less: Deductions:		
Contributions	$ 403.82	
Interest	1,146.81	
Casualty and Theft Losses	1,000.00	

Total Deductions	$ 2,550.63	
Less: One-half to wife (community one-half)	1,275.32	1,275.31
Community Share Net Income per Return		8,274.44
Add: Unreported Room Rental Income—365 days @ $20.00	7,300.00	
Allowances, Claremont Apt. Hotel restored to rental income	17,542.83	
Total Additions to Income	$24,842.83	
Less: Unidentified Cash Overages and Transient Room Rentals restored to Income on books	5,106.25	
Total Additional Net Income	19,736.58	
Less: One-half Community Income to wife	9,868.29	
One-half of the Additional Net Income to Bill Corbett		9,868.29
Corrected Net Income—Bill Corbett		$18,142.73
Income Tax on above Corrected Net Income		$ 5,720.30
Tax as computed above	$5,720.30	
Tax per return	1,797.71	
Tax Deficiency	$3,922.59	